IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1686

LODGES 743 AND 1746, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Lodges 743 and 1746, International Association of Machinists and Aerospace Workers, AFL-CIO, pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit affirming in part and remanding in part a decision and order of the National Labor Relations Board which, in the main, dismissed an unfair labor complaint against United Aircraft Corporation.

OPINIONS BELOW

The opinion of the United States Court of Appeals in this case, and in a companion Section 301 case (in

which a petition for certiorari will be filed by May 27, 1976), entered on September 9, 1975, is not yet officially reported but is published at 90 LRRM 2272 and appears in the separate appendix (1a-82a).[1]

The decision and order of the Board, issued July 1, 1971 (209a) and the recommended decision of the Trial Examiner, issued July 25, 1969 (248a), are reported at 192 NLRB 382.

JURISDICTION

A timely petition for rehearing and suggestion for rehearing *en banc* was denied by the Court of Appeals for the Second Circuit on December 29, 1975 (483a-484a). By order dated March 11, 1976, Mr. Justice Marshall granted an extension of time for filing this petition until May 20, 1976 (485a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1.(a) Are courts empowered to deny enforcement of vital statutory rights and correlative duties, established by Congress to effectuate transcendent national purposes, because at the time of the violator's action the state of the law was unsettled and the violator could reasonably have believed that his conduct was lawful?

[1] To avoid duplication and for convenience the pertinent opinions and orders in both cases are collected and printed in a single appendix, cited "—a." References preceding a semicolon are to that appendix. The joint appendix in the court below in the companion case is designated "J.A." The joint appendix in the court below in this case is designated "B.J.A." Material contained in the appendix to this petition is designated "App."

(b) If so, may enforcement be denied where the finding of "reasonableness" disregards precedent pointing to the illegality of the conduct; where actual reliance upon the state of the law was not found and is disproved by the violator's "cover up" of his conduct; and without balancing against the violator's interest the respective equities of the employees and the national policy interest in enforcement?

2. Does the holding of *NLRB* v. *Fleetwood Trailer Co.* (389 U.S. 375, 379 n. 4)—that proof of legitimate and substantial business justification for conduct adversely affect statutory rights "relates to justification, and the burden of such proof is on the employer"—refer only to the burden of going forward, or does it also impose on the employer the risk of nonpersuasion of that defense?

3. Did the Court of Appeals violate the teachings of *SEC* v. *Chenery Corp.*, 318 U.S. 80; 332 U.S. 194: 1) that an appellate court must judge the propriety of agency action "solely by the grounds invoked by the agency"; 2) that it may not "guess at the theory underlying the agency's action"; and 3) that it may not prohibit "retroactivity" of decisions in areas of "first impression"?

STATEMENT OF THE CASE

A. Operative Subsidiary Facts.

The relevant subsidiary facts are, for the most part, detailed in the companion petition. Those most pertinent to the questions here presented are summarized below.

6,536 economic strikers registered for reinstatement pursuant to August 11, 1960, Strike Settlement Agree-

ments which gave them preference to available jobs in order of seniority *inter sese* for four and a half months (9a). During the negotiations, the employer had led the Union to expect that strike related parts shortage bottlenecks would delay restoration of complements to pre-strike size only "temporarily" (15a-17a, 54a-55a) and that all strikers who registered, except those who had been permanently replaced, would be reinstated "immediately," meaning within a few weeks, that is, by about Labor Day. (15a, n. 5, 16a-17a, 54a-55a, 90a-91a). Permanently replaced strikers who were not recalled by Labor Day would be recalled as turnover created vacancies (15a, n. 5, 116a).[2]

The court below found (54a-55a):

> "there is no question that the Union was under the impression that the principal reason that strikers would not be reinstated immediately was that they had been permanently replaced. * * * [T]he prospect of the complement remaining below pre-strike levels for the duration of the Agreement was never seriously discussed in negotiations. Thus, the issue of temporary job unavailability beyond the expiration of the Agreements was not a consideration."

However, the major bargaining unit complements "remained significantly below pre-strike levels" until the Agreements expired (13a). In consequence, jobs did not become available for over 1,500 registered

[2] No striker was ever identified as having been permanently replaced and the Company admitted during the course of this litigation that none had been (J.A. 226). In addition, as the district court found, the Company arbitrarily "labeled" temporary summer hires "permanent" (163a-167a).

strikers during the life of the Agreements (10a). In addition, during this period, the Company filled vacancies with non-striker absentees and, wherever possible, transferred "active" employees, instead of recalling registered strikers, to fill openings (25a-40a). Accordingly, complement depression adversely affected work opportunities *only for registered strikers.* No "active" employees were laid off during the life of the Agreements (J.A. 628-629, 655-656, 907-908, 553-554).

As soon as the Agreements expired, the employer terminated the "employee" status of the unrecalled strikers (123a, 127a-129a), advertised in the newspapers for help (123a; J.A. 2279-2282, 2363) and quickly (within four months) restored the complements to normal size (13a, 25a) with outsiders and selected strikers hired as new employees out of seniority order (which the Company had been bound to observe during the life of the Agreements) (9a, 13a). The Company "made no attempt to ascertain how many of the registered strikers were qualified to fill these available jobs" (123a).[3]

During what the court below characterized as "the hiring surge that occurred after January 1, 1961" (21a), Pratt and Whitney hired "over 1,700 employees" (25a), of whom only 278, less than 16%, were

[3] However, those strikers whom the Company wished to rehire were sent an encouraging letter advising them that there were job openings in their former field of work; others, from the same occupational group and seniority area, frequently senior, were sent discouraging letters merely advising them that if they wished to apply the Company would consider them as new applicants (127a-128a; J.A. 2279, 2280). The Company offered no explanation for thus discriminating among strikers.

strikers (10a). In the first four months of 1961, Hamilton Standard hired 603 new employees (J.A. 2415-2416, 2445-2446), of whom only 177, or 29%, were strikers (10a, 13a). Almost all the new hires were assigned to "occupational groups" (93a), or "codes" of registered strikers. (J.A. 2262-2264; App. A p. 43, *infra*). The record contains "no explanation for the hiring between January-April, 1961, of such a large number of new employees as compared to strikers with superior work experience" (243a).

The Union was utterly dismayed by the low volume of striker recalls (5a, 10a-11a), but it did not know why so many were not being returned to work. The Company concealed the principal reason—complement depression—and pretended that the presence of replacements was *the only* reason. As described in App. B pp. 44-45, *infra,* it obfuscated and concealed the facts concerning complement depression until forced by the district court, on the eve of trial in February, 1967, to reveal the bargaining unit population statistics (J.A. 2297-2298, 2301-2302; 2412-2501A).

B. The Trial Examiner's Decision

The court below observed (46a):

> "The Trial Examiner issued his 138-page decision on July 25, 1969, approximately four months after the district court had handed down its ruling finding that the company had not breached the Strike Settlement Agreement except in certain limited respects. As to the period from the end of the strike to December 31, 1960, the expiration date of the recall Agreements, the Trial Examiner also ruled generally in favor of the Company. However, the Trial Examiner held that the Company had violated section 8(a)(3) of the Act by cutting off (as provided in the Agreements) the preferential hiring rights of strikers on December 31, 1960. He ruled that strikers not recalled by that date were entitled to preferential hiring treatment through April 1961, when full complements had been restored at all plants."

With respect to the alleged violations of Sections 8(a)(1) and (3) during 1960, the Trial Examiner did no more than adopt the reasoning of the district court (58a-59a, 60a, 405a-407a). With respect to the alleged Section 8(a)(1) and (3) violations in 1961 (402a-405a), the Trial Examiner did not purport to consider or apply the registered strikers' rights under *Fleetwood (NLRB* v. *Fleetwood Trailer Co.,* 389 U.S. 375 (1967)), which held that strikers for whom jobs are unavailable because of strike-related temporary complement depression on the date they apply for reinstatement, are entitled to reinstatement as jobs which they are qualified to fill become available. Rather, he cited only "*The Laidlaw Corp.,* 171 NLRB No. 175," (405a, n. 14), in which the Board, by "permissible extension" (50a), of *Fleetwood*, had conferred reinstatement rights on strikers whose jobs had been filled by permanent replacement or permanently abolished,[4] thereby overruling earlier cases holding that the "employee" status of *such* strikers terminated on the date they applied for reinstatement (49a-50a, 53a-54a). He failed to find a violation of the strikers' rights as applicants for employment (405a).

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[4] *Fleetwood*, rather than *Laidlaw*, applies to all registered strikers on the preferred hiring list as of December 31, 1960, who, the court below found, "were not recalled because reduced post-strike complements caused their jobs to be unavailable until after the expiration of the agreements." (48a).

C. The Board's Decision

1. Alleged violations during the settlement agreement period

Like the Trial Examiner, the Board purported to decide independently of the district court the Section 8(a)(1) and (3) issues during 1960, but it too adopted *in toto* Judge Clarie's findings, approach and conclusions (60a-62a). The Board held that the burden of proof on the depressed complement issue is on the Charging Parties and the General Counsel; that respondent has only the burden of going forward with an explanation after a *prima facie* case has been presented and that it is the burden of the Charging Parties and the General Counsel "to overcome [respondent's] answer" (219a). Here, the Board held, respondent answered the prima facie showing of violation "by evidence of the production imbalance", which the General Counsel and the Charging Parties failed to "overcome" (*id.*).[5]

2. Alleged violations after expiration of the settlement agreement

A majority of the Board, by 3-2 vote, held that "the Union had bargained away the reinstatement rights of those strikers who had not been rehired by the expiration date of the Agreements." (46a, A. 224-229a). It thereby overruled *sub silentio* the Board's uniform, historic, position that "statutory reinstatement rights represent a limit set by Congress on the risks to be borne by individual strikers [and therefore] are not subject to waiver by a collective bargaining representative." (52a; App. 242a).[6]

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[5] However, the Board misstated petitioners' position on the depressed complement issue (218a-219a).

[6] *Cf. NLRB* v. *Magnavox Co.*, 415 U.S. 322, 327-328 (1974); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 51 (1974).

The majority treated the reinstatement rights involved as stemming *only* from *Laidlaw,* although, as the dissenters pointed out (243a-245a), and the court below held (52a), the rights stemmed *entirely* from *Fleetwood* insofar as job unavailability resulted from the depressed complements, see p. 7, n. 4 *supra.* The majority did not apply the standard test: whether there had been a "knowing and voluntary" waiver (52a). Instead it relied for the most part on two factors: (1) "the Company made concessions which it might not have been willing to make if it knew that the Charging Parties would repudiate part of the recall Agreement" (225a); and (2) "At the time the recall agreement was signed in 1960, the prevalent rule could reasonably have been regarded as having been that an economic strikers' right to full reinstatement was determined as of the time that he made his application for reinstatement, and if no vacancy then existed, the employer was not required to place his name on a preferred hiring list" (226a). The Board did not expressly find, however, that this rule "could reasonably have been regarded" as applying where, as in *Fleetwood* and in this case, the reason no vacancy existed on the date of application was temporary complement depression resulting from production difficulties occasioned by the strike itself and the presence of temporary replacements.[7] Nor did the

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[7] In its brief to this Court in *Fleetwood,* the Board had represented that the rule was *not* applicable to such temporary job unavailability, analogizing *inter alia* to temporary replacement:

> "• • • the situation where the striker's job is temporarily unavailable due to a reduction in production caused by the strike is not distinguishable in any meaningful sense from one where the striker's job is unavailable because of other temporary measures taken to meet the strike, *e.g.*, a tem-

Board consider that petitioners' "repudiation" of "part of the recall agreement" resulted from prolonged temporary complement depression—a condition not contemplated by the parties (54a-55a; cf. Board dissent, 240a-241a).[8]

The majority did not address the question whether the Company's treatment of unrecalled strikers vis-a-vis strangers and other strikers in 1961 was inherently discriminatory and destructive of statutory rights or discriminatorily motivated, pp. 5-6, *supra*.

Members Fanning and Brown dissented from the refusal to find that the treatment accorded registered strikers in 1961 violated Section 8(a)(1) and (3) 238a-245a). They pointed out that *Fleetwood* rather than *Laidlaw* rights were involved because, but for unforeseen prolongation of the contemplated temporary complement depression all the strikers would have been reinstated by the time the complements had been restored to normal size (241a-242a, 243a, 245a); that the Strike Settlement Agreements cannot

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porary rescheduling of production, or performance of the work by other employees under a makeshift arrangement. It is well settled that, in the latter situations, the striker's right to reinstatement is not lost, as it would be in the case of job abolition. See *Firth Carpet Co.* v. *National Labor Relations Board*, 129 F.2d 633, 636 (C.A. 2) * * *." (Brief for NLRB, No. 49, Oct. Term, 1967, pp. 17-18.)

[8] The majority also asserted (226a-227a) that *Wooster Division of Borg-Warner Corporation*, 121 NLRB 1492, 1495 (1958) was "specific precedent for the validity of the recall agreement." The Board confessed error on this assertion in its brief to the court below, but denied that the error was "significant" because the "instant case and *Laher Spring* would still be the first occasions in which the Board confronted the impact of *Fleetwood* on recall agreements."

be construed as terminating statutory recall rights as of December 31, 1960, because the agreements were predicated on the assumption that full complements would be restored by Labor Day (239a-240a); that enforcement of *Fleetwood* rights involves no retroactivity problem, because *Fleetwood* did not "make new law with regard to the reinstatement rights of the economic strikers there involved and the ones in the instant case" (243a); and that even a knowing and deliberate waiver of *Fleetwood* rights would be unenforceable because "repugnant to the purposes and policies of the Act." (242a). They also stated that the Company's unexplained conduct in running "newspaper ads for new employees and * * * hiring between January-April 1961 * * * such a large number of new employees as compared to strikers with superior work experience * * * is inherently destructive of important employee rights, without reference to employer intent" (243a).

D. The Court of Appeals' Decision

1. Alleged violations in 1961.

The court below recognized that *Fleetwood* rights *are* involved (52a-55a), and it rejected the Board's "waiver" finding (*id.*). The court held that there could have been no "knowing and voluntary waiver" of *Fleetwood* rights in 1960 because (1) *Fleetwood* was not decided until 1967 (52a) and (2) inasmuch as prolonged complement depression resulting from parts shortage difficulties was not within the contemplation of the parties, petitioners "could not have knowingly waived" statutory reinstatement rights arising from *that* situation (54a-55a).

The court refused to find or remedy the violation of *Fleetwood* rights, however, on the ground that (56a) "a reasonable reading of decisions existing in 1960, particularly *Atlas Storage Division,* * * * [9] would be that the same rule [governing strikers who had been permanently replaced or whose jobs had been eliminated] applied to strikers whose jobs were temporarily unavailable at the close of the strike * * *." (See also 54a). The court disclosed that it found "no Board or court decision" as of 1960, dealing with the situation of

> "employees whose jobs were only temporarily unavailable at the time of their application for reinstatement, the situation considered by the Supreme Court in *Fleetwood.*" (53a).

It also found (*id.*) that

> "*Atlas Storage Division* can be read as applying only when an economic striker's job has been *permanently eliminated* by an employer. But there is a basis for concluding that the same rule should apply to temporary job unavailability, for in either case a striker could reasonably be expected to have an opportunity to regain a position with his employer." (Emphasis added.)

On that basis (56a-57a):

> "At the termination of the strike, one could have concluded that those strikers whose jobs were not available when the strike terminated, whether because they had been permanently replaced or because of production dislocations caused by the strike, had no further statutory right to rein-

[9] 112 NLRB 1175 (1955), enforced sub nom. *Chauffeurs, Teamsters & Helpers "General" Local No. 200* v. *NLRB,* 233 F.2d 233 (7 Cir. 1956).

statement, other than not to be discriminated against in favor of other new applicants for employment. * * * [W]hen, on December 31, 1960, jobs were not available to certain strikers, the statutory reinstatement rights of those individuals were extinguished.

Because *Laidlaw* and *Fleetwood* imposed duties on employers which had not theretofore existed, it would be unjust to use those cases to impose liability fifteen years after the events at issue transpired.

This is not a case in which the employer sought in bad faith to discriminate against strikers. * * * Throughout the strike settlement process, the Company had the advice of experienced labor counsel. The Strike Settlement Agreements providing for the preferential recall of strikers to jobs in their seniority areas which they were qualified to perform exceeded requirements of existing law. Under these circumstances we are not at this stage disposed to permit imposition of a substantial liability upon the Company."

The court below also held that the Trial Examiner's finding that there was no "pattern of discrimination" against strikers in 1961 was sustained by the evidence that the Company had invited all unrecalled strikers to file applications for employment as new employees, and, from January 1, to April 30, 1961, had hired a larger percentage of striker applicants than strangers who applied (57a-58a).

2. Alleged violations during 1960.

The court sustained the Board's depressed complement holding (60a-62a) including the Board's allocation of the burden of proof (61a-62a, n. 56). It

remanded the issue of transfers, promotions and non-striker absentees for reconsideration (62a-66a, 82a), stressing that the Board is not bound by the court's resolution of those issues in the companion case (64a).[10]

REASONS FOR GRANTING THE WRIT

Summary as to Question 1

The court below refused to find and remedy a violation of strikers' *Fleetwood* rights because it considered it "unjust" to do so inasmuch as, at the time of the acts in question, one could reasonably have believed, although it had never been decided, that temporary job unavailability due to strike-connected production difficulties was the legal equivalent of permanent replacement or job elimination. Assertion of discretion to deny enforcement of statutory rights for that reason is breach of the "duty" declared in *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 415-417, 419-422 (1975). "Good faith" based on an "unsettled state of the law" is not a permissible ground for frustration of "transcendent legislative purposes" and "important national goals" (422 U.S. at 417). As peitioners in Nos. 75-1475 and 75-1478 assert, on this point the decision in *United States* v. *United States Steel Corp.,* 520 F.2d 1043, 1059 (5 Cir., 1975), is in square conflict with the decision below in this case.

The existence of precedent susceptible to conflicting interpretations is but an example of the "good faith" defense to retroactivity, which this Court rejected in *Albemarle* and *Hanover Shoe Co.* v. *United Shoe*

[10] "The Board's findings were certainly not required to be parallel and indeed still ultimately may not be." (63a, n. 61).

Mach., 392 U.S. 481, 496 (1968). That defense cannot prevail merely because it is thought that the interpretation favorable to the actor was the more likely to be adopted. The posture of the law was more favorable to United Shoe's position than to United Aircraft's. Furthermore, a distinction based on the degree of reasonableness of the actor's belief in the legality of his conduct is incompatible with the "principled application of standards consistent with [transcendent national] purposes." *Albemarle, supra,* 422 U.S. at 417.

The decision below, if permitted to stand, would support a retroactivity defense in the vast majority of contested cases, not only under the National Labor Relations Act, but under all federal regulatory statutes. The legality of challenged conduct is rarely litigated unless the defendant believes he has at least a reasonable chance to prevail. Moreover, the decision will inspire widespread gambling with conduct of "questionable legality" (*Albemarle, supra,* 422 U.S. at 422), whenever that conduct is less expensive or more profitable than conduct which assuredly does not violate the statutory rights of others. For, under this decision, the actor can escape liability for his action not only if his legal position is sustained but also if it is deemed "reasonable." To thus invite experimentation at the fringes of the law will inevitably proliferate litigation and further burden the regulatory agencies and already burgeoning court dockets.

The nature of the judicial process cannot accommodate a "good faith" defense short of reliance on squarely applicable authoritative precedent subse-

quently overruled. A judgment, however reasonable, as to what the law will turn out to be unavoidably entails risk: "it is part of the game of life; we have to pay in countless ways for the absence of prophetic vision."[11] Moreover, only the prospect of retrospective back pay liability can inspire respect for the inchoate rights of others, and award of back pay is necessary to secure "complete justice" to the victims. *Albemarle, supra* at 418. *A fortiori*, a "good faith" defense must be rejected where, as here, the violator did not even claim *actual* reliance on the then state of the law, and his "cover up" disproves reliance; where a Trial Examiner, the Board, one of three Circuit Judges and this Court all rejected as untenable the proffered interpretation of precedent the first time it was presented; where it depends upon inventing a novel (and erroneous) rationale for the precedent assumed to have been most closely in point; and where the unsettled question of applicability concerned a rule based on misconstruction by inferior tribunals of an opinion of this Court interpreting an Act of Congress. Thus, under the rubric of avoiding "retroactivity," the court below granted respondent dispensation, at the expense of its victims, for what was, at best, a "reasonable" mistake of law by respondent.

Even if, contrary to reality, this were a true overruling situation, so that a retroactivity defense could be entertained, that would "simply open[] the door to equity; it [would] not depress the scales in the employer's favor." *Albemarle, supra,* at 422. The Third, Fifth and Seventh Circuits, in contrast to the

[11] Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921), pp. 142-143.

court below and the District of Columbia Circuit, have all balanced the equities in favor of strikers' statutory rights and effectuation of the important national purposes they serve, giving retrospective effect to overruling decisions. This division reflects a conflict of basic values which should be resolved by this Court.

I. THE COURT OF APPEALS' REFUSAL TO ACCORD THE STRIKERS THE STATUTORY RIGHTS DECLARED IN *FLEETWOOD* WAS GRAVE ERROR WARRANTING REVIEW.

A. The crucial assumption of the decision below, that a court of appeals is empowered to refuse to find and remedy a violation because it is "not * * * disposed to permit imposition of a substantial liability" (57a), where one "could have concluded" from a "reasonable reading of decisions" (56a), that the transgressor was authorized to act as it did, is in square conflict with the teaching of *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 415-417 (1975). This Court there said (at 417):

> "when Congress invokes the Chancellor's conscience to further transcendent legislative purposes, what is required is the principled application of standards consistent with those purposes and not 'equity [which] varies like the Chancellor's foot.' * * * Important national goals would be frustrated by a regime of discretion * * *."

As under Title VII of the Civil Rights Act of 1964 involved in *Albemarle,* so under the National Labor Relations Act, "transcendent legislative purposes" and "[i]mportant national goals would be frustrated by a regime of discretion." Fixing "the limit of the risk [an employee] runs by striking" (*N.L.R.B.* v.

Industrial Cotton Mills, 208 F.2d 87, 91 (4 Cir. 1953), cert. denied, 347 U.S. 935), by protecting strikers' reinstatement rights and opportunities, is the very keystone of promotion of collective bargaining and hence of national labor policy. *Labor Board* v. *Erie Resistor Corp.,* 373 U.S. 221, 233-235 (1963); *NLRB* v. *Fleetwood Trailer Co.,* 389 U.S. 375, 378 (1967). Accordingly, courts of appeals have "not merely the power but the duty" (*Albemarle, supra,* 422 U.S. at 418), to vindicate those rights and policies. Declination because a court believes enforcement would be "unjust" (56a-57a) to a transgressor is incompatible with judicial duty as defined by this Court.

B. *Albemarle* rejected equitable discretion to deny back pay against a "good faith" violator under a statutory scheme "expressly modelled on the back pay provision of the National Labor Relations Act" (422 U.S. at 419), which authorizes, but does not expressly mandate, back pay (*id.* at 415-417, 419-421). The Court said that Congress approved awards of "back pay as a matter of course— * * * not merely where employer violations are peculiarly deliberate, egregious, or inexcusable." (*id.* at 420)

The Court expressly held that "it is not a sufficient reason for denying back pay" that Albemarle's breach "had not been in 'bad faith'" (422 U.S. at 422), explaining (*id.*):

> "If backpay were awardable only upon a showing of bad faith, the remedy would become a punishment for moral turpitude, rather than a compensation for workers' injuries. This would read the 'make whole' purpose right out of Title VII, for a worker's injury is no less real simply because his employer did not inflict it in 'bad faith'[16]

[16] The backpay remedy of the NLRB on which the Title VII remedy was modeled, see n. 11, *supra,* is fully available even where the 'unfair labor practice' was committed in good faith. See, *e.g., NLRB* v. *Rutter-Rex Mfg. Co.,* 396 U.S. at 265; *American Machinery Corp.* v. *NLRB,* 424 F.2d 1321, 1328-1330 (CA 5, 1970); *Laidlaw Corp.* v. *NLRB,* 414 F.2d 99, 107 (CA 7 1969)."

In *Albemarle,* the principal basis for the district court's finding of lack of "bad faith" was that "judicial decisions had only recently focused directly on the discriminatory impact of seniority systems." *Id.,* at n. 15. This is indistinguishable in principle from the predicate of the holding below, that "there was in 1960 no Board and court decision dealing with * * * *" temporary job unavailability on the date of application, "the precise issue presented in *Fleetwood*" (53a, 56a). Both holdings equate good faith with an unsettled state of the law. In *Albemarle,* this Court defined "bad faith" as "maintaining a practice which [the employer] knew to be illegal or of highly questionable legality." 422 U.S., at 422. A "reasonable belief" that the practice was lawful is thus the *sine qua non* of good faith. And the holding below that back pay liability should not be imposed because there was "reasonable ground" for believing that temporary job unavailability due to strike resultant production difficulties is the legal equivalent of permanent replacement or job elimination is therefore a holding that back pay liability should not be imposed upon a good faith violator.[11a]

[11a] Assertion that the preferred hiring list "exceeded requirements of existing law" (57a) is based on the erroneous assumption that strikers for whom jobs were unavailable on the date of appli-

The Court of Appeals for the Fifth Circuit has read *Albemarle* as approving its own decisions which "have thoroughly rejected ['unsettled state of the law'] as a defense to back pay liability". *United States* v. *United States Steel Corp.*, 520 F.2d 1043, 1059 (5 Cir., 1975). Defendants in that case have petitioned for certiorari, asserting conflict with the decision of the Second Circuit in this case. *United States Steel Corp.* v. *Ford,* No. 75-1475, Petition for Certiorari, p. 24; *United Steelworkers of America, etc.* v. *Ford,* No. 75-1478, Petition for Certiorari, p. 24. We submit that both decisions cannot rationally coexist.

The decision below cannot effectively be limited on the theory that the question was not "an entirely open one" (56a) prior to *Fleetwood* because precedent could reasonably be construed as covering the situation. In a large majority of contested cases, there is precedent open to conflicting interpretations. Nor is a case removed from the "unsettled state of the law" category if it can be reasonably thought that the interpretation favorable to the action is the more likely to prevail, as the court below erroneously believed, see pp. 23-27, *infra.* Indeed, the posture of the law was more favorable to the defendant in *Hanover Shoe* than to United Aircraft, *Id.* In any event, a distinction based on the degree of reasonableness of the actor's belief in the legality of his conduct is incompatible with "principled application of standards consistent with [transcendent legislative] purposes" (*Albemarle, supra,* 422 U.S. at 417), for such a distinction would import "a regime of discretion" which "varies like the Chancellor's foot." (*id.*)

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cation because of temporary complement depression and the presence of temporary replacements (116a, 163a-167a), lost their "employee" status. See also, pp. 28-29, *infra.*

In *Hanover Shoe Co.* v. *United Shoe Mach.,* 392 U.S. 481, 496 (1968) the Court squarely rejected the "unsettled state of the law" defense to monetary recovery for injuries caused by violation of § 2 of the Sherman Act. The Third Circuit had held that damages could commence only from the date of a decision of this Court which it believed "fundamentally altered the law of monopolization" (*id.* at 495); it based its conclusion of fundamental alteration largely on prior litigation in this Court in which the same defendant's challenged practices had escaped condemnation under § 1 of the Act. This Court reversed in terms which mandate reversal here as well:

> The theory of the Court of Appeals seems to have been that when a party has significantly relied upon a clear and established doctrine, and the retrospective application of a newly declared doctrine would upset that justifiable reliance to his substantial injury, considerations of justice and fairness require that the new rule apply prospectively only. * * * *There is, of course, no reason to confront this theory unless we have before us a situation in which there was a clearly declared judicial doctrine upon which United relied and under which its conduct was lawful, a doctrine which was overruled in favor of a new rule according to which conduct performed in reliance upon the old rule would have been unlawful.* Because we do not believe that this case presents such a situation, we have no occasion to pass upon the theory of the Court of Appeals. (*Id.* at 496) (Emphasis added.)

The court below acknowledged that this case, likewise, does not present "such a situation" (53a, 56a).

The controlling distinction between an overruling decision and one which clarifies previously unsettled law was explicitly recognized in the single retroactiv-

ity decision which the court below purported to follow: *Retail, Wholesale and Department Store Union (RWDSU)* v. *NLRB,* 466 F.2d 380, 391, n. 26 (App. D.C., 1972). It distinguished between "the kind of case where the Board 'had not previously been confronted by the problem' and was required by the very absence of a previous standard and the nature of its duties to exercise the 'function of filling in the interstices of the Act,' [and] a case where the Board had confronted the problem before, had established an explicit standard of conduct, and now attempts to punish conformity to that standard under a new standard subsequently adopted." [12]

The distinction is firmly grounded in principle. In *RWDSU* the court explained denial of retrospective effect to an overruling decision (*Laidlaw*) as resting on (*id.,* at 392) "* * * the principles which underlie the very notion of an ordered society, in which authoritatively established rules of conduct may fairly be relied upon." These principles require no less that, short of overruling ineluctibly applicable "well established and long accepted" law (*id.* at 391), the risk of legal uncertainty be borne by the actor who turns out to be wrong. Mr. Justice Cardozo explained that "we have to pay in countless ways for the absence of prophetic vision"; [13] the risk of reliance on prophecy, however reasonable, as to what unsettled law will turn

[12] *Id.* at 391, quoting *SEC* v. *Chenery Corp.,* 332 U.S. 194, 202-203. See also *id.* at n. 26, quoting with approval Davis, *Administrative Law* § 17.08 (1970 Supp.): "Surely the difference between [retroactive clarification of uncertain law] and retroactive change in clear law that has been specifically relied upon *can and should* be recognized." (*Id.*, emphasis added.)

[13] Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921), p. 145.

out to be, is fairly placed on the actor, particularly where he has an option which will surely *not* prejudice rights of others.

The Court made this very point in *Albemarle, supra,* 422 U.S. at 417-418, in demonstrating the insufficiency of injunctive relief: "If employers faced only the prospect of [liability for conduct after adjudication], they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a backpay award that 'provide[s] the spur or catalyst * * *' " to refrain from gambling with inchoate rights of others. In addition, backpay is "necessary" to secure "complete justice" to the victims. *Id.,* at 418.

C. We have thus far accepted the Court of Appeals' premise that in 1960 there was reasonable ground for concluding that *Atlas Storage* implied that strike-resultant temporary job unavailability on date of application terminated strikers' statutory "employee" status. But that assumption itself raises questions which are most appropriate for this Court to decide. First, the assumption is derived, in part, from misinterpretation of *Fleetwood.* The court below reasoned backwards:

> "If the Supreme Court in *Fleetwood* had not changed the law as it applied to reinstatement of economic strikers but instead simply reaffirmed long-established principles, we doubt that the case would have so immediately prompted the Board [in *Laidlaw*] to change course and overrule three of its prior decisions (*Brown & Root Inc., supra; Bartlett Collins Company, supra;* and *Atlas Storage Division, supra*)."

The fallacy is apparent. Whether *Fleetwood* "changed the law" with respect to the rights of economic strikers *whose jobs were temporarily unavailable* depends on what the state of the law had been with respect to the rights of *such* strikers, not on what the law was with respect to strikers whose jobs had been *permanently* eliminated or who had been *permanently* replaced, as in the three decisions cited by the Court of Appeals. That the *Fleetwood* majority, over the objection of the concurring opinion, declared principles broader than necessary to dispose of the case before it does not support the conclusion that the Court thereby reversed prior law governing the situation in *Fleetwood.*[14] If this Court had thought in *Fleetwood* that it was changing the law in temporary complement depression cases, it would have had to confront the retroactivity issue squarely posed in Judge Pope's concurring opinion below (366 F.2d at 130).

The method employed below in determining the status of the law for the purpose of evaluating a retroactivity defense is in square conflict with this Court's method in *Hanover*. There, Justice White painstakingly and skeptically examined United Shoe's argument, although supported by independent commentators, that authoritative decisions and judicial pronouncements *squarely authorized* its conduct. Here, where no such claim was or could have been made,

[14] Mr. Justice Harlan, joined by Mr. Justice Stewart, wrote: "The issue in this case seems to me rather simpler, and the indicated resolution of it rather more obvious, than the majority opinion implies." (389 U.S. at 381.) If a majority of the Court had adopted this approach, there might have been no *Laidlaw*, but the result in *Fleetwood* would have been the same, and no one would ever have conceived of a retroactivity issue in *United Aircraft*.

the court confined its attention to a single precedent, for which it invented a rationale which could, at best, *arguably* support its extension to respondent's action,[15] ignoring all precedents which looked to the contrary.[16]

[15] Central to the Court's analysis is the following rhetorical question:

> "Why, if an employer was not required to seek out employees whose jobs had been abolished or absorbed even though, *as expressly recognized in Atlas Storage Division, vacancies would likely occur soon thereafter,* should an employer be required to seek out those whose jobs would be unavailable for an indefinite period of time?" (56a, emphasis added.)

The question is based on a misreading of *Atlas:* there is nothing in *Atlas* which recognized or even mentioned a *likelihood* that vacancies would occur soon, much less considered what effect, if any, such likelihood should have on strikers' status or reinstatement rights. Accordingly, the analogy between anticipated turnover and anticipated complement reflation has no basis in *Atlas,* which, perhaps, is why it has never previously been suggested by anyone, including the two Judges of the Ninth Circuit who found the Board's decision in *Fleetwood* inconsistent with *Atlas.*

[16] As the Board argued to this Court in *Fleetwood* (see p. 9, n. 7, *supra*), *Firth Carpet Co.* v. *NLRB,* 129 F.2d 633, 636 (2 Cir., 1942), held that *temporary replacement* does not result in loss of the right to reinstatement although permanent replacement under *Mackay Radio* (304 U.S. 333), does. *Kansas Milling Co.* v. *NLRB,* 185 F.2d 413, 420 (10 Cir., 1950), also so held. We submit that, in 1960, counsel knowing that *Mackay* had been so limited, could not reasonably have expected that *Atlas* would be extended to cover temporary complement depression.

Other precedents existed in representation cases, where, from 1947 on, strikers' eligibility to vote had depended upon their entitlement to reinstatement (Act, Sec. 9(c)(3)), and the Board, applying *Mackay* (*Union Mfg. Co.,* 101 NLRB 1028 (1952), had consistently distinguished between temporary and permanent complement depression. See, *e.g., Pipe Machinery Company,* 79 NLRB 1332, 1326-1327, 1328 (1948); *Midwest Screw Products Co.,* 86 NLRB 643, 644 (1949); *E. J. Kelley Co.,* 98 NLRB 486, 488 (1952); *Cuttingham Buick, Inc.,* 112 NLRB 386, 387 (1955); *Union Mfg. Co.,* 123 NLRB 1633, 1635 (1959).

Above all, the Court of Appeals ignored what this Court actually said in *Mackay Radio,* see text and note at p. 27, n. 17 *infra.*

Further in conflict with *Hanover's* approach, the court relied on the mere fact that two Judges in the Ninth Circuit had equated temporary depression with job abolition; disregarding the facts that the Trial Examiner and the Board in *Fleetwood* considered the equation so patently false as to warrant its rejection without comment; that the dissenting Ninth Circuit Judge could not "accept", or even "see" the majority's reasoning and declared that their holding "cannot * * * be justified" (366 F.2d at 131), and that this Court, in sustaining the Board's distinction of temporary complement depression from permanent replacement and job elimination (389 U.S. at 379, 381; *id.* at 382-383, concurring opinion) did not even deem it necessary to mention the claimed inconsistency of that decision with *Atlas*.

The court below leaped from its unfounded assumption that *Atlas* provided *reasonable grounds to believe* that these unreplaced strikers lost their rights to the even wilder conclusion that those rights did not *exist* until this Court decided *Fleetwood* (56a). Quite aside from its lack of internal logic, and its invitation to raise a "good faith" defense in every fairly litigable case, that conclusion is inconsistent with, and thwarts, Congress' decision to make strikers' rights and employers' correlative duties effective *as of 1935*. And if the Court of Appeals' decision is to be understood as meaning that these rights and duties existed until the Seventh Circuit decision, but were thereafter suspended until *Fleetwood,* the difference is one of degree, not principle, for courts of appeals are not authorized to suspend the effectiveness of Acts of Congress.

The decision below is also inconsistent with the status of this Court as the ultimate interpreter of legislation. First, and most obviously, it denies effect to this Court's interpretation of the Act in *Fleetwood.* Second, the entire loss-of-"employee"-status doctrine stemmed from misinterpretation by inferior tribunals of this Court's decision in *Labor Board* v. *Mackay Radio,* 304 U.S. 333, 346-347 (1938). See *Little Rock Airmotive, Inc.* v. *NLRB,* 455 F.2d 163, 166 (8 Cir., 1972).[17] Given *Mackay,* if anything was nonexistent in 1960 it was a privilege to terminate the statutory "employee" status of innocent strikers without a decision of this Court so interpreting § 2(3). As Judge Cardozo said: "We will not help out the man who has trusted to the judgment of some inferior court. In his case, the chance of miscalculation is felt to be a fair risk in the game of life, not different in degree from the risk of any other misconception of right or duty."[18]

In short, if *Fleetwood* and its antecedents are properly understood, it is clear that the Court of Appeals, in the guise of preventing "retroactivity", has exonerated respondent for what was, at best, a mistake of law. That holding is an innovation in the administration of the National Labor Relations Act with such sweeping potential ramifications that it should be extirpated at its first appearance.

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[17] "*Mackay* • • • apparently limited the employers' options, absent a valid reason for refusing reinstatement to a particular employee, to 'determining which of its striking employees would have *to wait* because five men had taken permanent positions during the strike . . .' • • •

The Board, however, did not read *Mackay* so liberally." 455 F.2d at 166, quoting 304 U.S. at 347.

[18] Op. cit. n. 11, p. 16, *supra,* pp. 147-148.

D. The decision below conflicts with *Hanover Shoe* and *RWDSU* also on the essential element of reliance. *Hanover* establishes that the equitable consideration underlying a retroactivity defense is that the actor "significantly relied upon" precedent. 392 U.S. at 496. And in *RWDSU* Judge McGowan not only found that the "Company attempted to conform its conduct" to a "standard" which was subsequently overruled, he detailed the evidence which demonstrated *actual* reliance (466 F.2d at 391-392).

In this case, by contrast, the Court of Appeals could find only that "throughout the strike settlement process, the Company had the advice of experienced labor counsel" (57a). There is no evidence, and the court did not find, that counsel had advised that strikers for whom jobs were temporarily unavailable because of the depressed complement on the date they registered for work lost their statutory "employee status", or that their termination after the settlement agreement expired, when the complements were still depressed and thousands of jobs were immediately available, would be lawful, or that the "Company attempted to conform its conduct" to existing law. During discovery, the Company had successfully objected to production of any memoranda, notes and correspondence containing "legal advice given by counsel" (J.A. 1216, 1218, 1219) and, at trial, it introduced no evidence whatsoever that it had relied on a legal theory, although its principal labor relations officials all testified.

In fact, the record in this case negates reliance. United Aircraft's contemporaneous conduct establishes that it knew full well that under the law as it then stood it was permitted to terminate reinstate-

ment rights *only* of strikers who had been permanently replaced or whose jobs had been abolished. The district court found that during the strike the Company arbitrarily mislabelled temporary summer hires "permanent" (163a-167a). On June 26, 1961, it told the NLRB: "[t]he truth very simply is that if the Company failed on August 13 [at the end of the strike] to reinstate a striker to his former job, it was necessarily because the job was filled by a replacement or because his old job had been *eliminated.*" (J.A. 2253-2254, emphasis added).

Most tellingly, the Company denied for four years that the complement had been temporarily depressed and, until 1967, concealed the bargaining unit population figures which would have shown the extent to which temporary depression was responsible for job unavailability. App. B, *infra*. If the Company had seriously believed that as a matter of law temporary complement depression was the equivalent of permanent job abolition it would not have engaged in this lengthy and elaborate course of concealment and deception, including labeling temporary hires "permanent."

E. Even if *Atlas* had been squarely in point it would not follow that denial of retrospective liability was proper. An overruled decision "simply opens the door to equity; it does not depress the scales in the employer's favor." *Albemarle, supra,* 422 U.S. at 422. The Third, Fifth and Seventh Circuits have all rejected the retroactivity defense and vindicated strikers' rights even where the *Hanover* conditions were met. *Labor Board* v. *Erie Resistor Corp.*, 373 U.S. 221 (1963), expressly disapproved (*id.* at 222) the decision of the Ninth Circuit in *NLRB* v. *Potlatch Forests, Inc.*, 189 F.2d 82 (1951), which had held that the grant of superseniority to strikers—the precise con-

duct involved in *Erie Resistor*—was not *per se* unlawful. On remand, Erie asserted a retroactivity defense which the Third Circuit rejected:

> "*It is argued that the representatives of the Company acted in good faith in the honest belief that they had a right to adopt the job assurance plan to protect replacements. We are of the view that good faith, based upon an erroneous interpretation of the law, is not available as a defense.* [Citations omitted.] *An employer who pursues a course of conduct later determined to be an unfair labor practice does so at his peril.* Ibid. We can perceive no inequity in the Board's directives. The equities in this case seem to favor the employees; it would be inequitable to require them to absorb pay losses ascribable to the unfair labor practice of the Company." [19]

The Seventh and Fifth Circuits have held that *Laidlaw*, which, unlike *Fleetwood,* truly overruled prior precedent, see p. 7, *supra,* applies retroactively to employers who, in reliance on *Atlas Storage,* had denied reinstatement to permanently replaced strikers. *Laidlaw Corp.* v. *NLRB,* 414 F.2d 99, 107 (7 Cir., 1969), cert. denied 397 U.S. 920; *American Machinery Corp.* v. *NLRB,* 424 F.2d 1321, 1328-1330 (5 Cir., 1970). Both courts followed the teaching of *SEC* v. *Chenery Corp.,* 332 U.S. 194, 203 (1947), that the effect of retroactivity "must be balanced against the mischief of producing a result which is contrary to a statutory design as to legal and equitable principles." As the Fifth Circuit said: "Consequently, we must look not only to the consequences for American Machinery, but to the statutory scheme and to the effects on the strikers if we do not enforce the order"

[19] *International U. of E., R. & M. Wkrs., Local 613* v. *NLRB,* 328 F.2d 723, 727 (3 Cir. 1964), emphasis added.

(424 F.2d at 1329). Concern for *those* "effects" is likewise at the root of *Albemarle, supra.* The court below, in contrast, looked only to the consequences for United Aircraft and ignored the effects of its decision on the statutory scheme and on the strikers.[20] In this it grievously erred.

Indeed, if the court had balanced the competing interests as *Chenery* requires, it would necessarily have concluded "that the importance of protecting the statutory rights of [the] employees outweighs the fact that the company may have relied on a prior Board rule or policy" (*Laidlaw,* 414 F.2d at 107).[21] For, as the General Counsel successfully

[20] In *RWDSU* the D.C. Circuit likewise failed to consider the strikers' countervailing interests, or the adverse consequences on the statutory scheme which the Seventh and Fifth Circuits deemed decisive. The *RWDSU* court sought to distinguish *Laidlaw* and *American Machinery* on the basis that in both those cases the court had sustained the Board's alternate theory that the employer was discriminatorily motivated. 466 F.2d at 392. But the cases cannot properly be so limited. In discussing retroactivity the *Laidlaw* court made no reference to the motivation finding, but assumed legitimate reliance on the prior Board rule, compare 414 F.2d at 107 with *id.* at 106, discussing motivation; the *American Machinery* court stated that the "finding of discriminatory motivation and the failure to rehire *further reinforces* our conclusion in this case" (*id.* at 1330, emphasis added),—a conclusion deemed compelled by what *Chenery* "teaches" (*id.* at 1328).

[21] So here. By eliminating thousands of the Union's most militant members from the work force, and making an object lesson of those who returned as new employees, the Company destroyed the capacity of the Union effectively to protect employee interests against management. Thus, by relieving the Company of liability the court allowed it to retain the "enjoyment of advantage[s] which [it] had gained by violation of the Act", contrary to the purpose of the unfair labor practice proceedings, *National Licorice Co.* v. *Labor Board,* 309 U.S. 350, 364 (1940).

argued in that case: "Unless the disadvantaged strikers are compensated, they will have been penalized for exercising statutorily protected rights and the effect of discouraging future such exercises will not be completely dissipated. * * *" (*id.*). In reaching the same conclusion the Fifth Circuit relied also on *NLRB* v. *Rutter-Rex,* 396 U.S. 258, 265 (1969), which held that "the Board could properly conclude that backpay is not only punishment for an unfair labor practice, but is also a remedy designed to restore, so far as possible, the status quo which would have obtained but for the wrongful act." We believe it is precisely because these cases establish that the denial of retroactivity is inconsistent with the legislative policy and purposes of the National Labor Relations Act that this Court cited *Rutter-Rex, Laidlaw* and *American Machinery* in footnote 16 of *Albemarle,* 422 U.S. 422, quoted at p. 19, *supra.*[22]

[22] Failure to consider the strikers' equities also fatally infected the Court of Appeals' consideration of the two factors which it deemed controlling. The first and apparently foremost consideration was the "substantial liability" which the Company faced. But substantiality is a product solely of "the sheer number [of discriminatees] involved", (66a, n. 61), and represents "only actual losses" suffered by the employees as a result of the Company's violation. *Labor Board* v. *Phelps Dodge Corp.*, 313 U.S. 177, 198 (1941). The court cites no authority for the patently unconscionable proposition that all the discriminatees should be denied back pay because there were so many of them, and that the Company should be relieved of all liability because it inflicted injury on so many. Moreover, the Company's *net* loss would be much less than its liability. For example, a major element thereof is the difference between what it paid those strikers who were hired as new employees, and what it would have paid them if it had reinstated them to their former positions in accordance with the requirements of the Act.

So too, particularly in view of the court's rejection of the Company's contention that the Charging Parties and the General Counsel were to blame for the delay (66a, n. 61), was the court's reliance on delay as a factor militating against relief in square conflict with *NLRB* v. *Rutter-Rex,* 396 U.S. at 264.

Indeed, early in the administration of the Act the Court rejected an "employer's objection to the burden of back pay placed upon it because of the Board's alleged delay in entering the final order" (*Labor Board* v. *Electric Cleaner Co.,* 315 U.S. 685, 697-698 (1942)), saying in part, "[w]e cannot penalize the employees for this happening" (*id.* at 698). Again, in *NLRB* v. *Katz,* 369 U.S. 736, 748, n. 16 (1962), the Court held: "Inordinate delay in any case is regrettable, but Congress has introduced no time limitation into the Act except that in § 10(b)." Denial of *all* relief because *any* relief must be delayed would be doubly unjust in the present case for, to the extent that it can be attributed to either side rather than to the scope of the litigation (66a, n. 61), delay is attributable to the Company's stubborn concealment of complement depression (see App. B).

In the absence of an explicit, legally justified, determination that the inequity of retroactivity outweighs the equities of the strikers and effectuation of the policies of the Act, "the argument of retroactivity becomes nothing more than a claim that the [Board] lacks power to enforce the standards of the Act in this proceeding. Such a claim deserves rejection." *SEC* v. *Chenery Corp., supra,* 332 U.S. at 203-204.

II. THE COURT OF APPEALS' MISUNDERSTANDING OF FLEETWOOD'S "BURDEN OF PROOF" RULE REQUIRES REVIEW, REVERSAL AND REMAND TO THE BOARD.

The Court of Appeals' approval of the Board's holding that respondent met its burden on the depressed complement issue by producing "evidence of the production imbalance" p. 8, *supra,* is in conflict with *Fleetwood,* where this Court held that proof:

> "that the jobs of complainants had not been absorbed or that they were still available' * * * is not essential to establish an unfair labor prac-

tice. [Such proof] relates to *justification*, and *the burden of such proof is on the employer.* NLRB v. Great Dane Trailers, supra, 388 U.S. [26] at 34 * * *. Cf. also NLRB v. Plastilite Corp., 375 F.2d 343, 348 (C.A. 8th Cir. 1967)." 389 U.S. at 379 (emphasis added).

The Court of Appeals interpreted this as follows:

"The Supreme Court's concern in *Fleetwood* was that an employee not have the burden of himself showing the *lack* of business justification when all the proof relating to justification was in possession of the Company. It is incumbent on the Company to come forward with what evidence of justification that it might have. *Fleetwood* did not, as we read it, decide what party ultimately bore the risk of nonpersuasion in the event that after all the evidence is in the scale remains evenly balanced. The employer in *Fleetwood* had presented no evidence in justification." (61a-62a, n. 56).

We submit that the Court of Appeals' theory as to why this Court decided the burden of proof issue as it did in *Fleetwood* is utterly without foundation. Indeed, that rationalization is refuted by the opinion, which states its own reason: "such proof * * * relates to justification". "[J]ustification" is synonymous with defense, as to which the risk of nonpersuasion has traditionally been placed on the defendant. This Court patently intended the employer to bear the risk of nonpersuasion that his "claim" of "business justification" was both "legitimate and substantial." 389 U.S. at 379, 381.

The burden of proof rule approved below, as the District Judge himself recognized (105-107a), is a departure from the settled rule in Labor Board pro-

ceedings.[23] Even if the Court of Appeals' reading of *Fleetwood* were plausible, this Court should resolve the issue because of its great importance in the administration of the Act. Where the burden of persuasion lies potentially affects every case under §§ 8 (a)(1) and (3) in which the employer asserts a "legitimate and substantial business justification" for denying rights under the Act, "for 'it is plain that where the burden of proof lies may be decisive of the outcome.'" *Armstrong* v. *Manzo,* 380 U.S. 545, 551 (1965), following *Speiser* v. *Randall,* 357 U.S. 513, 525 (1958).[24] In this case, if the Board had applied the proper burden of proof rule, it would have been less likely to have overlooked such deficiencies as respondent's failure to offer any justification for underpopulating the machine shop until after the settlement agreement expired (24a, p. 8, n. 5, *supra*).

III. IN AFFIRMING THE BOARD'S ORDER, THE COURT OF APPEALS DEPARTED FROM THE ACCEPTED COURSE OF JUDICIAL REVIEW OF ADMINISTRATIVE AGENCY ACTION.

The decision below violates each of the three limitations of *SEC* v. *Chenery Corp.,* 318 U.S. 80 (1943);

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[23] Judge Clarie held, erroneously we submit, that a district court is not required by *Lincoln Mills* to follow what he correctly considered the Board rule (106a-107a). The Board then, *sub silentio,* overturned its own historic rule in favor of the erroneous rule Judge Clarie enunciated for Section 301 cases (219a).

[24] This same proposition makes unavailing the Court of Appeals' statement: "Furthermore the Board's findings reveal that this was not a case in which the placement of the ultimate burden of persuasion was decisive of the outcome" (62a). Those "findings" are not identified. Moreover, for the Court to speculate what decision the Board would have reached if it had reallocated the burden of proof as required by *Fleetwood,* was to enter the domain of the Board's fact finding function, in contravention of settled principles of judicial review. See p. 36, *infra*.

332 U.S. 194 (1947): (1) that an appellate court must judge the propriety of agency action "solely by the grounds invoked by the agency" (332 U.S. at 196); (2) that it may not "guess at the theory underlying the agency's action" (*id.*, at 196-197), and (3) that it may not prohibit "retroactivity" in areas of "first impression" (*id.*, at 202-203). This pervasive departure from the appropriate course of judicial review calls for exercise of this Court's supervisory powers, quite apart from the intrinsic importance of the substantive rights at stake.

A. As detailed in the Statement, the Board's refusal to accord *Fleetwood* rights to these strikers did not rest upon the theory that *Fleetwood* should not be given retroactive effect in this proceeding. The Board did not even mention *Fleetwood*. Moreover, its discussion of the fact that *Laidlaw* overruled *Atlas, Brown & Root, etc.*, was not directed to the propriety of denying *Fleetwood* rights retrospective application. Such denial would have been totally inconsistent with the Board's philosophy and practice, as exemplified in *Laidlaw* itself. Rather, the Board referred to the overruled decisions (as to *Borg-Warner*, see p. 10, n. 8, *supra*), only as an element of its waiver rationale. When the Court of Appeals properly rejected the entire waiver theory, it was "powerless to affirm the [Board's] action by substituting" (332 U.S. at 196), the theory that retrospectivity would be "unjust" because the Company had reasonable grounds to believe that its conduct was lawful. The Court of Appeals therein violated the first of the three teachings of *Chenery*.

The court below also violated the third teaching of *Chenery* when it held: "Whether to give retroactive

effect to administrative rules promulgated in agency adjudication is a question of law, and reviewing courts are not obligated to grant any deference to the agency decision" (55a, n. 48). Since the court admitted that the temporary complement depression defense was an issue of first impression when the Company acted (55a-56a), it was powerless to prohibit retrospective application of *Fleetwood* rights.

B. The majority of the Board, like the Trial Examiner, never explained why terminating unrecalled strikers' "employee" status on January 3, 1961, when the Company needed immediately to fill jobs for which they were qualified, advertising for help in the newspapers and repopulating the complements predominantly with outsiders (the ratio was 6-1 at Pratt & Whitney and more than 2-1 at Hamilton Standard), was not, as the dissenters maintained (243a), "inherently destructive" of strikers' rights as applicants for employment, and discriminatorily motivated in violation of *Mackay Radio*, 304 U.S. 333, 346 (1938). Surely, such conduct "inherently * * * discourages union membership" within the principle of *Radio Officers* v. *Labor Board*, 347 U.S. 17, 45 (1954).

That issue was touched upon in the opinions of the Trial Examiner and the Board, if at all, only in a single sentence of the Trial Examiner's decision:

> "[T]he evidence offered by the general counsel and charging parties is insufficient to find a pattern of discrimination against all employees named and listed in the complaint." (58a, quoting 405a).

That *ipse dixit*, to which the Board added nothing, is too cryptic to comply with *Chenery's* second re-

quirement—"clarity" in agency rationale—in any case. *A fortiori* is it inadequate where, as we demonstrate below, the result is irreconcilable with other Board decisions. Apparent inconsistency requires the agency to provide "articulated reasons for the decisions in and distinction among these cases, * * * " absent which "the Board's action * * * cannot be properly reviewed" (*Labor Board* v. *Metropolitan Ins. Co.*, 380 U.S. 438, 442-443, and see the discussion of *Chenery, id.*, at 444).

In *Laidlaw*, 171 NLRB 1366, 1367 (col. 2) (1968), the Board held, as an alternative ground for decision, that the employer had violated strikers' rights as applicants for employment by its "failure to recall the older employees with long experience while at the same time advertising for new help to fill vacancies." It declared also that inasmuch as the Company "brought forward no evidence of business justification for refusing to reinstate these experienced employees while continuing to advertise for and hire new unskilled employees" its "conduct was inherently destructive of employee rights" (*ibid.*, at 1369 (col. 1)). It said that an "employer's preference for strangers over tested and competent employees is sufficient basis for inferring * * * antiunion motivation." (*Ibid.*, at 1369, n. 14), affirmed on this point 414 F.2d 99, 106 (7 Cir.). In *Laher Spring and Electric Car Co.*, 192 NLRB 464, decided on the same day as *United Aircraft*, the Board also found a *prima facie* case of illegal motivation established by the employer's "preference for outsiders" over those strikers whom it did not re-employ. The rule of *Laidlaw* and *Laher* has been followed: in *Fire Alert Co.*, 207 NLRB 885, 886 (1973), the Board held: "The discrimination

against [strikers considered as applicants for employment] is proven * * * for Respondent bypassed its own qualified employees who remained unreinstated in favor of new hires off the street."

The Court of Appeals compounded its error by introducing a rationale of its own for discounting the discrimination, again violating the first *Chenery* principle. The court reasoned that discriminatory motivation was negated because a greater percentage of applying strikers than of applying non-strikers was hired (58a). But this comparison is irrelevant as a matter of law, since the strikers and the other applicants were not otherwise equal. The strikers were all "tested and competent" (*Laidlaw, supra*), whereas the other applicants were at best "strangers" (*id.*). Moreover, none of the strangers who were *not* hired were shown to have been qualified. Thus, whereas hundreds of qualified strikers were not reemployed, for aught that appears no *qualified* stranger was denied a job. The comparison, therefore, "sheds no light whatsoever upon the dispute * * *." *United States* v. *Hazelwood School District*, — F.2d — (8 Cir., 1976), 12 F.E.P. Cases, 1161, 1166.

C. Lastly, the court violated the second precept of *Chenery* in affirming dismissal of the allegation that temporary complement depression was illegally motivated.[25] For, here again, the Board's findings are inadequate to explain why it reached the opposite result from that it reached on the same day in *Laher*, 192

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[25] This error, like the error in allocation of the burden of proof, discussed in point II *supra*, requires a remand to the Board. As noted earlier, the court's statement that the Board's findings justify dismissal regardless of how the burden of proof is allocated violates the first principle of *Chenery*.

NLRB 464, where temporary complement depression *was* held discriminatorily motivated. The two circumstances deemed most compelling in *Laher*—complement reduction during the settlement agreement period followed by a "dramatic increase in new hires after the preferential period" and a "substantial increase" in overtime during the preferential period (192 NLRB at 465)—are likewise present here. The irreconcilability of *Laher* and *United Aircraft* was stressed by petitioners on appeal, but it was wholly disregarded by the court.[26]

[26] As we develop in the companion petition, the appellate court's analysis differed in material respects from that of the district court. The Board accepted the district court's reasoning as masterful. While the Court of Appeals had authority to substitute its own views for those of the district court, the first *Chenery* principle expressly denies it comparable authority with respect to the Board (318 U.S. at 88).

CONCLUSION

The integrity of Congress' "repeated solicitude for the right to strike" (*Erie Resistor,* 373 U.S. at 233-234) is at stake in this case. Over fifteen hundred strikers have been refused protection of rights which Congress gave them. Passage of time has not dulled the importance of vindication of those rights. The rebuff flouts established principles of jurisprudence, labor law and administrative law. This petition should be granted.

Respectfully submitted,

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APPENDIX A

NEW HIRES 1/1-5/1/61 INTO OCCUPATIONAL CODES OF REGISTERED STRIKERS AWAITING RECALL AS OF 12/31/60

	Total New Hires 1/1-5/1	Reg. Stkrs. Hired As New Emps.	Non-Reg. Stkrs. Hired	No. of Reg. Stkrs. Awaiting Recall To Occ. Codes Where New Hires Made	Total Hires Into Occ. Codes of Reg. Stkrs. Awaiting Recall 12/30/60	Reg. Stkrs. Hired Into Old Job	Reg. Stkrs. Hired Into Diff. Job	Reg. Stkrs. Hired As Trainees
P.&.W.	1893	276	1617	665	1471	74	192	42
H.S.	614	173	441	537	416	44	129	

APPENDIX B

Company Concealment of Depressed Complement and Attribution of Job Unavailability Entirely to Presence of Replacements.

On September 20, 1960, Company counsel told the arbitration panel of retired Connecticut Supreme Court Justices who were hearing the cases of the fifty strikers charged with strike misconduct (4a; J.A. 2282) that the reason registered strikers had not been recalled was

> "that to make room for them we would have to fire the people we hired during the strike * * *. At Broad Brook and Windsor Locks there are approximately a thousand people who have been replaced. We have hired a thousand people during the strike, which means there are approximately a thousand people out of work who had been working there before." (J.A. 2295, 2296)

The facts were otherwise. Hamilton had hired only 676 employees during the strike (J.A. 2313), and by September 1, there had been 217 terminations (J.A. 2309). As of September 1, 541 of the 1,000 unrecalled strikers were out due to complement depression, not the presence of "replacements." By September 30, there had been 51 more terminations and there were 175 more in October-December, 1960 (J.A. 2309).

On November 18, 1960, United Aircraft's Personnel Director, Mooney, informed Lodge 1746 by letter that there were "more than 18,000 employees currently in the bargaining unit" (J.A. 1976), although in fact there were only 14,834 "active" employees (J.A. 2335—1,166 fewer than the 16,000 normally in the unit (J.A. 1975). Even counting the 1,086 unrecalled registered strikers (J.A. 2320), the total comes only to 15,920. On December 10, 1962, Company counsel represented to the district court in oral argument in the companion case:

> *"I am advised that on December 31 we had more employees than we had before the strike."* (J.A. 1935, emphasis added.)

In fact, it had 14,897 (J.A. 2335), "significantly" fewer (13a).

On August 21, 1963, Pratt & Whitney Personnel Manager Morse testified before the Trial Examiner in this case that there were "slightly more people on the payroll at the end of phase one [approximately September 5] than we had before the strike took place." (J.A. 1946). However, there were only 15,362 on the payroll on September 1, compared with 16,104 on June 7, 1960 (J.A. 2335). In making his calculations, Morse had omitted the 1,127 terminations from the beginning of the strike to September 1 (J.A. 2308).

As late as June 8, 1964, Company counsel in oral argument in the district court denied that: "there was a smaller work force after the strike than before the strike." (J.A. 1940-1941).